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No. 84-1165

In The
Supreme Court of the United States
October Term, 1984

UNITED STATES OF AMERICA,

Petitioner,

v.

JOSEPH BENCHIMOL,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the government breached its plea agreement with the respondent under Fed. R. Crim. P. 11(e)(1)(B) when the government had promised as a part of the plea agreement to recommend to the sentencing judge a sentence of probation and restitution by the respondent and then at sentencing merely stated "that is an accurate representation" where the record STATES the government's position as "Rather they would stand silent".

2. Whether the appropriate remedy by the Court of Appeals for this government's breach of a plea bargain was a remand for resentencing before a different judge where the trial judge expressed a vague recollection of information on May 21, 1976 where (a) none of the parties at that hearing, including the reporter, have an independent recollection of the events or testimony taken at that hearing and (b) the certified transcript of the hearing contradicts the trial judge's vague recollection.

3. Whether a Writ of Certiorari should be granted by this Court in this case which (a) does not involve a question of public importance, (b) represents no "real or embarrassing conflict of opinion and authority between the Circuit Courts of Appeal", involves no "special and important reasons for review", and lastly (d) involves a statute which has been repealed by new law.

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STATEMENT OF THE CASE

On March 12, 1976, a Complaint was filed in the District Court charging the respondent with one count of Mail Fraud, in violation of 18 U.S.C. Section 1341. The government as an inducement to the entry of a plea of guilty promised to recommend probation and a particular sum of restitution (E.R. 24, Exhibit; E.R. 6, page 2, item 11).[1] Pursuant to the bargain, respondent entered a plea of guilty on April 30, 1976 (4/30/76 Tr. 4,6).[2]

In entering his plea respondent relied on the statements of the Court that by entering the plea he would waive his right to appeal (4/30/76 Tr. 4, lines 20-25, and 5, lines 1-13).[3]

At the hearing for sentencing, the government did not specifically state its agreed recommendation. Instead, after respondent's counsel mentioned a "slight correction in the presentence report" to the effect that the government would stand silent, the prosecutor stated merely, "That is an accurate representation." The presentence report did not contain any recommendation of probation with restitution.[4] The sentencing judge then sentenced the respondent to be committed under the Youth Corrections Act, Title 18 U.S.C. Sections 5001 et seq., then in effect, for a maximum six years' custody (5/21/76 Tr. 10).

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[1]"E.R." refers to the Excerpts of Clerk's Record filed in the Court of Appeals.

[2]"Tr." refers to the Reporter's Transcript of the proceeding for the date shown.

[3]The statements made in Court in this respect are reproduced in Appendix A, infra.

[4]The statements made in Court in this respect are reproduced in Appendix B, infra.

Respondent subsequently filed a motion under Fed. R. Crim, P. 32(d) and 28 U.S.C. 2255 to withdraw his guilty plea or, in the alternative, for postconviction relief (ER 8). By the motion respondent contended that the government had "Failed to meet its promise pursuant to the terms of the Plea Bargain" and that the government "stood silent without recommending probation" (ER 9); that he had been deprived of his right to appeal by relying on the Court's statement that he waived the same (ER 11), demonstrating a basis for relief under 28 U.S.C. Section 2255 (ER 11); that his guilty plea was not knowing and voluntary; and that he had thus been subjected to manifest injustice within Fed. R. Crim. P. 32(d) and its progeny (ER 13).

At the hearing on respondent's motion on December 15, 1981, the Judge in effect testified against the record, in that he rewrote the transcript of the hearing premised upon a "very vague" recollection retained some five and one-half years after the original hearing, making assumptions as to allegedly missing words and phrases in the record. As a result he in effect found the recommendation that was absent from the record. He stated that "Either I or counsel make statements. They aren't completely understood. Reporters are no better than counsel. . . ." (12/15/81 Tr. 8).[5] The motion was denied.

The respondent appealed from the order denying his motion to the Ninth Circuit Court of Appeals. He contended that the district judge had in effect testified against the record in the motion hearing, and erred in

[5]The statements made in Court in this respect are reproduced in Appendix C, infra.

not referring the hearing to another judge. He further contended that because of a breach of a plea agreement being a violation of due process and manifest injustice within Fed. R. Crim. P. 32(d), the trial court had erred in denying his motion. He further contended the trial court had effectively misled him regarding his right to appeal, with the result that his sentence had been imposed in violation of the Constitution, within 28 U.S.C. 2255.

The respondent's Opening Brief was filed in the Ninth Circuit Court of Appeals on June 21, 1982. The appellee government filed its brief about one and one-half years later, on or about February 3, 1984; only after being admonished that unless the brief was filed, the government would be precluded from filing same.[6]

The Ninth Circuit Court of Appeals reversed and remanded the case for resentencing, 738 F.2d 1001 (1984), stating, 738 F.2d at 1001:

> . . . Here the government made less than a perfunctory recommendation to the sentencing judge; it made a single remark at the sentencing hearing agreeing with Benchimol's counsel's correction of the presentence report. Even this remark was ambiguous. Benchimol's Counsel's statement that the agreement *recommended* probation with restitution could have been interpreted as a statement of past intent of the gov-

[6]The language of the Order of the Court of Appeals in this respect appears as Appendix D, infra. It should be noted that the government was reprimanded for failing to follow the briefing schedule set by the Ninth Circuit and precluded from giving oral argument. Query-How concerned was the government about the issues of the case? The respondent submits they obviously were not that interested.

ernment. Moreover, the introduction of the erroneous presentence report stating that the government would stand silent enhances the impression that the government had withdrawn from its earlier support of probation with restitution. . . .

———o———

ARGUMENT FOR DENIAL OF THE PETITION

The respondent herein will address the questions presented in the order of their importance.

First, the respondent addresses the question whether a review on writ of certiorari is appropriate in this case.

The laws governing sentencing, probation, youthful offenders, and the methods to be employed by Federal trial Courts in scrutinizing plea agreements under Fed. R. Crim. P. 11(e) have presently been revised and reformed under a wholly new statutory scheme by the enactment of the Comprehensive Crime Control Act of 1984, Title II, Pub. L. No. 98-473, 98 Stat. 1976 et seq. The Youth Corrections Act, 18 U.S.C., Part IV, Chapter 402, Sections 5001 et seq., under which the respondent herein was sentenced, was repealed.[7] The former law which contained specialized sentencing statutes applicable to narrow classes of offenders including class of individuals between the ages of 18 and 22 (of which the respondent herein was a member), and involved sentences made indeterminate by a parole release program. The Comprehensive Crime Control Act of 1984 introduces a "sentencing guidelines system" that is intended to treat all classes of offenses com-

[7]Pub. L. No. 98-473 Section 218(g), U.S. CODE CONG. & AD. NEWS (98 Stat.) 2027.

mitted by all categories of offenders consistently, within detailed criteria set forth in new sentencing guidelines supplemented by policy statements.[8] Certain considerations within the guidelines, and a statement of reasons on the record for imposing a sentence, are made obligatory on the sentencing Judge. P. L. No. 98-473 Section 3553, 98 Stat. 1990. With reference to the acceptance or rejection of plea agreements entered into between the defense and prosecution, 28 U.S.C. Section 994, as added 98 Stat. 2019, now provides, in pertinent part:

> (a) The [United States Sentencing] Commission. . . . shall promulgate and distribute to all Courts of the United States Probation System—
>
> . . . (2) general policy statements regarding application of the guidelines or any other aspect of sentencing . . . including the appropriate use of—
>
> . . . (D) the authority granted under rule 11(e) (2) of the Federal Rules of Criminal Procedure to accept or reject a plea agreement entered into pursuant to rule 11(e) (1); . . .

Pertinent commentary regarding 28 U.S.C. Section 994(a) (2) (D) in S. Rep. No. 98-225, 98th Cong., 63, as reprinted in U.S. CODE CONG. & AD. NEWS No. 9A, at 66, is as follows:

> . . . Under . . . 28 U.S.C. 994(a) (2) (D), the Sentencing Commission is directed to issue policy statements for consideration by Federal Judges in deciding whether to accept a plea agreement. This guidance will assure that judges can examine plea agreements. . . . Professor Stephen J. Schulhofer, who initially raised the question of whether sentencing guidelines

[8]See S. Rep. No. 98-225, 98th Cong., 40, 41, reprinted in 1984 U.S. CODE CONG. & AD. NEWS No. 9A, at 43, 54.

would shift too much discretion to prosecutors, has stated that judicial review of plea bargaining under such policy statements should alleviate any potential problem in this area.

Congress has thus introduced a newly weighed and considered statutory scheme, constituted by new underlying theories and objectives for sentencing. S. Rep. 98-225 indicates that Congress has entered the field of "judicial review of plea bargaining", which "will assure that judges can examine plea agreements." Issues surrounding firm and effective communication of the prosecutor's recommendations, and the sentencing judge's receipt and scrutiny of the recommendations, thus come into a new and different substantive and procedural setting.

Consequently this case presents a poor vehicle for adjudication of any issue of present interest to the public. Due to the unusual facts and archaic subject matter involved, the effects of a Supreme Court pronouncement on this case would be confined to the case itself or to a small and diminishing class of formerly-sentenced persons. The effects of such a pronouncement could be, on the other hand, divisive, confusing and would have little value in prospective application to sentencing, as the pronouncement would occur without any relevance to the new, existing law and its rationales. Any principle of importance to the public would be better addressed to the context of a case arising under the Comprehensive Crime Control Act of 1984 and the guidelines and policy statements mandated in that Act.

A review on writ of certiorari will be granted only when there are special and important reasons therefor. U.S. Sup. Ct. Rule 17.

In *Rice v. Sioux City Cemetery,* 349 U.S. 70 (1955), following the granting of a petition for a writ of certiorari, a statute, enacted subsequent to the commencement of the case and which would govern future cases of that type, was called to the attention of the United States Supreme Court. The Court, in reconsideration of whether there existed "special and important reasons" for granting review, vacated its order granting the writ, and in dismissing the petition for the writ as improvidently granted, stated, 349 U.S. at 74:

> . . . A federal question raised by a petitioner may be "of substance" in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants. . . .

And at 349 U.S. at 76-77:

> Had the statute been properly brought to our attention . . . the case would have assumed such an isolated significance that it would hardly have been brought here in the first instance. . . .
>
> Moreover, the evident difficulties of the case suggest that, in the absence of compelling reason, we should not risk inconclusive and divisive disposition of a case when time may further illumine or completely outmode the issues in dispute.

The argument that the new law in its prospective application, would bypass and deny a remedy to the petitioner, was raised unsuccessfully in the dissenting opinion. 349 U.S. at 80.

Under the circumstance of a controversy laid arising under a subsequently repealed statute, this Court has stated that "the question is therefore not of public im-

portance." *District of Columbia v. Sweeney,* 310 U.S. 631 (1940).

Certiorari is granted in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties. *NLRB v. Pittsburgh S.S. Co.,* 340 U.S. 498, 502 (1951).

The fact that the petitioner's Brief on the appeal was filed and served approximately one and one-half years after the filing by the respondent of the Opening Brief demonstrates the lack of interest shown by the government, the lapse of time making any issues of public interest obsolete, and a lack of special and important reasons for review on writ of certiorari.

With respect to the question whether the government breached its plea agreement, sufficient law already exists to dispose of the instant case, with no substantial intercircuit conflict. The Court of Appeals below, *United States v. Benchimol,* 738 F.2d 1001, at 1001-1003, noted that it was "adopt[ing] the position taken by other circuits which had considered the issue", and cited *United States v. Grandinetti,* 564 F.2d 723 (5th Cir. 1977) and *United States v. Brown,* 500 F.2d 375 (4th Cir. 1974). Circuit Judge Wallace in dissent acknowledged the general rule that "In recommending a sentence as a part of a plea bargain, the prosecutor must effectively communicate the government's firm position to the sentencing judge" (738 F.2d at 1003). Yet he attempted to distinguish the instant case from *United States v. Grandinetti,* supra, and *United States v. Brown,* supra, on the basis that in *Grandinetti* and *Brown,* per Judge Wallace, " . . . the prosecutors expressed open distaste for the plea bargains." 738 F.2d at 1004.

The law imposes a requirement of effective communication of a firm position. "Open distaste" is but one of many ways in which a prosecutor may fall short of this requirement. The Court of Appeals in the instant case found that the prosecutor while not expressing open distaste for the plea agreement, had not effectively communicated a firm position of the government, and so the Court reached a result which was consistent with these principles. There was a breach of the plea agreement within existing law. There is no "real and embarrassing conflict of opinion and authority between the circuit courts of appeal" (*NLRB v. Pittsburgh S.S. Co.,* supra, 340 U.S. at 502) as would encourage review on writ of certiorari.

With respect to the proper remedy for a breach of a plea agreement, this Court in *Santobello v. New York,* 404 U.S. 257 (1951), listed possible remedies as specific performance of the agreement or vacation of the plea, the choice to be a discretionary measure, guided by the circumstances of the case, such that the promise be fulfilled. 404 U.S. at 262-263. Resentencing, as directed by the Court of Appeals in this case, is well within that rule of discretion.

CONCLUSION

1. The government breached its plea agreement with the respondent under Fed. R. Crim. P. 11(e) (1) (B) when the government had promised as a part of the plea agreement to recommend to the sentencing judge a sentence of probation and restitution by the respondent and then at sentencing merely stated "that is an accurate representation", where the record stated the government's position as "Rather they would stand silent".

2. A remand by the Court of Appeals with directions to resentence the respondent was an appropriate remedy for the government's breach of the plea agreement.

3. A review of this case on writ of certiorari as urged by the petitioner presents at best a risk of inconclusive and divisive disposition. This case does not afford an appropriate instance for review of the questions presented. Given that this is a case of isolated significance by virtue of its unusual and limited facts and that there now exists a new body of statutes governing sentencing to which a decision on this case would have no relevance, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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March 1985

APPENDIX A

PAGE 4, LINE 21, THROUGH PAGE 5, LINE 13, OF THE TRANSCRIPT

PROCEEDINGS IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA ON APRIL 3, 1976

[4] Q. [BY THE COURT:] All right. You know you are entitled to a jury trial; that twelve jurors would have to find you guilty before you could be determined to be guilty; that you'd have the power to compel the production of witnesses and evidence on your own behalf, to see and hear the witnesses against you; [5] to either take the witness stand yourself or refuse to take the witness stand if you chose to, and if you did not take the witness stand no adverse inference could be drawn against you? In addition, you'd have the right to appeal if you were found guilty?

You waive all of those rights if you enter a guilty plea. Have you discussed all of this with Ms. Trumbell?

A. [BY JOSEPH BENCHIMOL:] Yes, I have.

Q. And you are aware of what your rights are?

A. Yes.

Q. And you are prepared to waive all of them by entering a guilty plea; correct?

A. Yes, Your Honor.

APPENDIX B

PAGE 4 OF THE TRANSCRIPT

PROCEEDINGS IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA ON MAY 21, 1976

[4] THE CLERK: Criminal case 76-225; United States versus Joseph Benchimol.

Counsel, State your appearances, please.

MR. GIBBONS: John Gibbons on behalf of the United States.

MS. TRUMBELL: Patricia Trumbell for Mr. Benchimol, who is present in court.

THE COURT: Judgment of guilty will be entered to the plea of guilty to the information in this matter.

Anything you want to say in mitigation of punishment, Ms. Trumbell?

MS. TRUMBELL: Yes, Your Honor. I have read and worked very closely with Mr. Cheveria in this case, and I believe Mr. Cheveria has represented that to you.

There is one slight correction in the presentence report and he may very well have pointed that out. The government recommended there be probation with restitution in this case. Rather they would stand silent, and I believe that's what the report reflects.

MR. GIBBONS: That is an accurate representation.

APPENDIX C

PAGE 5, LINE 19, THROUGH PAGE 6, LINE 13, OF THE TRANSCRIPT

PROCEEDINGS IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA ON DECEMBER 15, 1981

[5] THE COURT: . . . That particular reporter almost of necessity had to transcribe what was in his notes because his notes went into a computer and the computer translated the notes. He customarily did so accurately. The failure is in the ability to hear, as I say, small connecting words. There were a couple words left out in there.

[6] Miss Trumbull does not have a trumpeting voice and unfortunately on frequent occasion I don't. And I have found, as I think every lawyer and judge had, any number of instances where prepositions or conjunctives or qualifying words are swallowed or stated so rapidly that the reporter simply doesn't pick them up in the notes.

I have an independent recollection of this in a very vague way even though it was this far back. I do remember the occasion, and on reviewing the presentence report I remembered the circumstances, and there was no doubt in my mind at that time that everyone was in perfect understanding of what the position of the United States was and of the fact that I was disregarding it in that case.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 81-4689

DC No. CR 76-225 RHS
Northern California

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE

v.

JOSEPH BENCHIMOL, DEFENDANT-APPELLANT

[Filed Mar. 27, 1984]

Before: WALLACE, HUG and FERGUSON,
Circuit Judges.

Because of the government's failure to file an answering brief, on December 19, 1983, Benchimol moved for an order reversing his judgment of conviction or, in the alternative, for an order precluding the government from filing a brief and presenting oral argument and sanctions. It ppears that Benchimol filed his opening brief June 21, 1982, and served the government. The government does not deny receipt of the brief. The government's brief was due thirty (30) days later. The government was silent for nine months. On March 25, 1983, the clerk of this court

sent the government a notice stating it had fourteen (14) days to lodge a brief and bring a motion for relief from default. The government admits it received this notice. The government did not respond. Finally, a representative of this court inquired of the government by telephone on February 14, 1984, whether the government intended to respond. [Appendix "D" draft pg. 1 of 2] [2]A brief was lodged and a motion for late filing was filed February 24, 1984.

We co clude that the attempted explanation by the Assistant United States Attorney is inadequate. The United States Attorney is admonished due to the failure to adhere to an agreed time schedule and due to the failure to respond to a notice from this court.

As we deem this public reprimand is sufficient, the brief of the government lodged February 24, 1984, is ordered filed. No sanctions will be imposed. These grounds are not sufficient for reversal. The government is precluded from oral argument.